

From: David Eckman
To: microsoft.atr(a)usdoj.gov
Date: 1/3/02 2:15pm
Subject: Microsoft Settlement

Please submit the following comments to the Judge hearing this matter:

I urge you NOT to approve the settlement terms with Microsoft that the federal government has negotiated. Following are several reasons and suggested order terms, based on my extensive use of personal computers in my law practice since 1983-84 and my knowledge of and experience with many operating systems and a wide variety of computer software, as well as in developing software:

I and millions of other OS/2 users have been damaged by Microsoft's illegal use of tying agreements and other illegal conduct to gain a monopoly and its retaliatory and predatory use of its monopoly power against OS/2 (and other operating systems). Based on my experience and knowledge of the industry, what I believe will punish Microsoft most effectively while also stimulating competition would be an order directing Microsoft as follows for at least 20 years:

(1) Require Microsoft to LICENSE AT NO COST to the licensee ALL CODE necessary (a) to allow all other operating systems to run 32-bit (and eventually higher level) programs written for Windows and every other operating system developed by Microsoft, and (b) to allow other developers' software to run as effectively under Windows and such other operating systems as Microsoft's own programs. That code should be made available to developers of operating system enhancements and plugins as well as the operating system developers themselves and should be made available as soon as it is being incorporated into any Microsoft product. The only limitation on such a requirement should be that the licensee be a U.S. citizen or company.

(2) Prohibit Microsoft from any arrangement by which its software would be included in new computers. Microsoft's past use of its monopoly power and its use of tying agreements and other illegal arrangements to discourage computer manufacturers from offering non-Microsoft operating systems and other software on their computers has seriously harmed competition, and those still willing to compete need many years without Microsoft's predatory conduct to catch up.

(3) Prohibit Microsoft from any alterations, modifications or additions to Java and other open software except those approved and adopted by the consortiums developing the open software for everyone's use. Microsoft has used its monopoly power to write its own version of Java, which was offered by Sun as open software. There are presently sites that my version of Netscape cannot access because they use a Microsoft version of Java. Java developers have felt the stinging impact of Microsoft's illegal

behavior. Its consequences in the future may be even more severe if the federal government's weak legal precedent is established.

With the order components set forth above, what Microsoft does with Explorer would be irrelevant since other operating systems could include other web browsers, yet all operating systems could run Windows (and other Microsoft operating system) programs, which has become the standard for most software being developed today because of Microsoft's past illegal conduct. Imposing the restrictions for a minimum of 20 years would allow other operating systems to strengthen and grow in usage to the point where software program developers would find it profitable to produce native versions of their software for such systems. The history of OS/2 shows that this would work:

While Windows was a 16-bit system and its 16-bit code was included in OS/2, sales and use of OS/2 grew, and native applications were being developed. But when Windows became a 32-bit program and Microsoft's 32-bit Windows code was not included in OS/2, OS/2's market position and its growing acceptance were seriously hurt. That was exacerbated by Microsoft's illegal tying and other agreements that kept manufacturers from including OS/2 on their new computers. While OS/2 has remained alive despite Microsoft's illegal conduct (because of OS/2's superiority as an operating system over everything Microsoft has produced thus far) it cannot return to marketing success without the ability to run applications that most users want. In fact, IBM has been forced to scale back further work on OS/2, and it has almost given up on it because of Microsoft's pressure on it and the difficulty of dealing with Microsoft's illegal use of its monopoly power. OS/2 could return to effective competition with licenses of Microsoft's operating system code, at no cost to IBM and/or those who might want to enhance the system if IBM chooses not to do it.

Finally, I understand that Microsoft has violated with impunity consent decrees of the past. It should be ordered to pay a substantial fine. It should also be ordered to pay all costs of monitoring its compliance in the future. This should continue for at least 20 years.

IBM was severely punished over 20 years ago for its antitrust behavior. It then managed to behave in a responsible manner and has continued to do so. There is no reason why Microsoft should not be similarly punished now, so that it and Bill Gates can learn to behave as responsible corporate citizens. The economic consequences to Microsoft, however severe, would be entirely appropriate to its outrageous and illegal conduct. And I have no doubt that it could survive as a healthy company.

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[J:] David Eckman
Law Offices of David W. Eckman
davide@eckman-law.com

<http://www.eckman-law.com>
3730 Kirby Dr., Suite 1200
Houston, Texas 77098-3927
713-661-2065